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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/688,320	10/15/2003	Mark A. Clarner	05918-340001 / VGCP No. 6	8855
26161 7590 04/28/2008 FISH & RICHARDSON PC P.O. BOX 1022 MINNEAPOLIS, MN 55440-1022				
EXAMINER				
SANDY, ROBERT JOHN				
ART UNIT		PAPER NUMBER		
3677				
MAIL DATE		DELIVERY MODE		
04/28/2008		PAPER		

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARK A. CLARNER

Appeal 2007-2778
Application 10/688,320
Technology Center 3677

Decided: April 28, 2008

Before MURRIEL E. CRAWFORD, JENNIFER D. BAHR, and JOSEPH A.
FISCHETTI, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Mark A. Clarner (Appellant) originally appealed under 35 U.S.C.
§ 134 from the Examiner's decision finally rejecting claims 1-3, 5-17, 24-28,

30-37, 45-55, 60-68, and 76-79.¹ On page 1 of the Reply Brief², however, Appellant states as follows:

After further consideration and in light of the additional explanation in the Examiner's answer, Applicant withdraws claims 1, 2, 5, 6, 9, 12, 13, 15, 24-27, 30, 31, 34, 45-47, 51, 53, 60, 65, 66, 76, 77 from the appeal. However, Applicant maintains the appeal with respect to the final rejection of claims 3, 7, 8, 10, 11, 14, 16, 17, 28, 32, 33, 35-37, 48-50, 52, 54, 55, 61-64, 67, 68, 78, and 79 in the Final Office Action dated December 7, 2005.

Appellant's statement that the claims withdrawn from the appeal "will be canceled upon allowance of the remaining claims" (Reply Br. 2) is superfluous, as Appellant's withdrawal of the appeal as to claims 1, 2, 5, 6, 9, 12, 13, 15, 24-27, 30, 31, 34, 45-47, 51, 53, 60, 65, 66, 76, and 77 operates as authorization to cancel these claims from the application. MPEP § 1215.03.³ The appeal continues as to the remaining claims 3, 7, 8, 10, 11, 14, 16, 17, 28, 32, 33, 35-37, 48-50, 52, 54, 55, 61-64, 67, 68, 78, and 79. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

The Invention

Appellant's claimed invention is directed to arrays of male touch fastener elements having stems integrally connected with a base, such

¹ Claims 4, 18-23, 29, 38-44, 56-59, and 69-75 have been cancelled.

² We make reference in this opinion to the Reply Brief filed January 9, 2007 and to the Examiner's Answer mailed November 9, 2006.

³ We note that the Examiner did not direct that claims 1, 2, 5, 6, 9, 12, 13, 15, 24-27, 30, 31, 34, 45-47, 51, 53, 60, 65, 66, 76, 77 be cancelled from the application, as provided in MPEP § 1215.03. We assume these claims will be cancelled upon return of jurisdiction of the application to the Examiner.

fastener elements having two generally parallel oppositely-directed engaging heads extending from each stem (Specification 1:3-5).

The Rejections

Appellant seeks review of the Examiner's rejection of claims 3, 7, 8, 11, 16, 17, 28, 32, 33, 36, 37, 48, 49, 52, 54, 55, 61-63, 67, 68, 78, and 79 under 35 U.S.C. § 102(b) as anticipated by Akeno (US 5,781,969, issued July 21, 1998) and the rejections under 35 U.S.C. § 103(a) of claims 14, 50, and 64 as unpatentable over Akeno and claims 10 and 35 as unpatentable over Akeno in view of Takizawa (US 5,537,720, issued July 23, 1996).⁴

Rather than reiterate the positions of the Examiner and Appellant in their entirety, we refer in this opinion to the Examiner's Answer (mailed November 9, 2006) and Appellant's Reply Brief (filed January 9, 2007).⁵ Appellant's representative presented oral argument on April 9, 2008.

THE ISSUES

At issue in this appeal is whether Akeno teaches the dimensional ratios recited in claims 3, 7, 8, 16, 17, 28, 32, 48, 49, and 63 so as to anticipate the subject matter of these claims.

⁴ Appellant's appeal of the rejection of claims 24, 45, and 60 under 35 U.S.C. § 103(a) as unpatentable over Akeno in view of Romanko (US 6,484,371 B1, issued November 26, 2002) is withdrawn.

⁵ We need not make reference in this opinion to Appellant's Appeal Brief (filed October 16, 2006), as it includes only arguments directed to features in claims now withdrawn from the appeal, and arguments repeated in the Reply Brief.

Also at issue in this appeal is whether Akeno teaches a fastener element wherein the lower surfaces of the heads are arched, as called for in claim 11.

Another issue in this appeal is whether the limitation “wherein the stem has opposing side surfaces defined by severed resin” patentably distinguishes the subject matter of claim 14 over Akeno’s fastener.

Also at issue in this appeal is whether the limitation of the ratio of the overall crook height, measured from a lowermost extent of the corresponding tip to an uppermost extent of the crook, to an entrance height being greater than 0.6 patentably distinguishes the subject matter of claim 50 and claim 64 over Akeno’s fastener. An additional issue is whether Akeno teaches the mold release factor (MRF) recited in claim 64.

Another issue presented in the appeal is whether the combined teachings of Akeno and Takizawa establish that the subject matter of claims 10 and 35 would have been obvious.

FINDINGS OF FACT

Akeno discloses a molded surface fastener comprising a substrate sheet 1 and a plurality of engaging elements 2 standing on a front surface of the sheet. Each engaging element 2 includes a single stem 21, a pair of necks 22 branching from the upper end of the stem, and a pair of straight heads 23 extending outwardly via necks 22 and slightly upwardly sloping at their vertical ends. Col. 9, ll. 9-17. With reference to Figure 4B, Akeno expressly discloses the following dimensions in an exemplary embodiment:

- The height H1 is 0.348 mm (col. 11, ll. 34-35).
- The distance H1’ is 0.297 mm (col. 11, ll. 31-33).

- The head length L1 is 0.152 mm (col. 11, ll. 35-36).
- The height H2 is 0.125 mm (col. 11, ll. 36-38).
- The angle θ' of inclination of the lower surface of engaging head 23 is 20.6° (col. 11, ll. 39-41).
- The angle θ denotes the angle of inclination of the top surface of engaging head 23 (col. 6, ll. 18-20, col. 11, ll. 38-39)
- The depth d1 of recess 1a (H1 minus H1') is 0.051 mm.

Akeno also teaches that the height H2 can be 0 mm, in which case no stem 21 exists, and a number of engaging heads 23 rise directly from the front surface of the substrate sheet 1 via a number of necks 22, respectively. Col. 11, ll. 21-29. Additionally, the height H1' from the front surface of the substrate sheet 1 and the uppermost point O of heads 23 can range from 0.2 mm to 1.2 mm. Col. 11, ll. 12-15.

The bottom of the hollow defined between the inner surfaces 22a of necks 22 “may be disposed at a desired position,” and “should be disposed preferably in or slightly under a horizontal plane passing lower ends of bottom surfaces of the engaging heads 23.” Col. 11, ll. 2-6.

An exemplary apparatus for molding Akeno's surface fastener is illustrated in Figure 7 and described from column 12, line 45 to column 14, line 65. The apparatus includes a die wheel 5 provided with engaging-element-forming cavities 51, an injection nozzle 6 for injecting a molten resin 4 onto the die wheel, a cooling water bath 7b disposed under the die wheel 5 into which die wheel 5 is dipped, and a non-illustrated trimming unit downstream and diagonally upwardly of the cooling bath 7b for cutting edges of the primary-intermediate molded surface fastener SF, which is a blank for a final-product molded surface fastener SF'. Upper and lower

rollers 10, 11 rotate in opposite directions in synchronism with one another to separate the primary-intermediate surface fastener SF off the die wheel 5. The trimming unit cuts off opposite side edges of the primary-intermediate surface fastener SF. The primary-intermediate surface fastener SF is then moved through and between a pair of heating and pressing rollers 9a, 9b provided for forming protuberances 23' of the engaging head 23 (figs. 3, 4A, and 5).

Akeno appears to be intended as an improvement over the conventional mushroom-type engaging element having an umbrella-shape engaging head projecting in all directions from the upper end of the stem. Col. 5, l. 58 to col. 6, l. 5.

The ordinary and customary meaning of “crook” is “a hooked, bent, or curved thing or part”.⁶ Appellant does not define the term “crook” or use it in the Specification in any manner inconsistent with or divergent from such meaning.

The ordinary and customary meaning of “overhang” is “to hang or project over or beyond.”⁷

We do not find the term “overhang” used in Appellant’s Specification, outside of the claims, and Appellant does not point to either the use or definition of that term in the Specification, outside of the claims.

Appellant’s crooks 256, as depicted in Figure 3, extend out beyond the planar surfaces of the front and rear faces of stem 108.

⁶ Webster's New World Dictionary 337 (David B. Guralnik ed., 2nd Coll. Ed., Simon & Schuster, Inc. 1984).

⁷ *Id.* at 1013.

DISCUSSION

Claims 3, 28, 49, and 63

Each of these claims requires each fastener element to have “an overall length between opposite extents of the heads, measured parallel to the base, of at least 1.8 times the overall height of the fastener element.” Appellant contends that the Examiner “improperly relies on scaling of unscaled patent drawings and/or improper inferences derived from such drawings.” Reply Br. 4. According to Appellant, Akeno fails to provide a clear overall length dimension, thereby failing to provide sufficient information from which to calculate a ratio of overall length to overall height of the fastener element. *Id.* We agree with Appellant.

Anticipation is established only when a single prior art reference discloses, expressly or under the principles of inherency, each and every element of a claimed invention. *RCA Corp. v. Applied Digital Data Sys., Inc.*, 730 F.2d 1440, 1444 (Fed. Cir. 1984). In other words, there must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention. *Scripps Clinic & Research Found. v. Genentech Inc.*, 927 F.2d 1565, 1576 (Fed. Cir. 1991).

The Examiner does not specify where Akeno provides support for the finding that each fastener element of Akeno has an overall length of at least 1.8 times the overall height of the fastener element. Answer 8. The overall height H1' of Akeno's exemplary fastener element is 0.297 mm and the minimum height H1' of Akeno's fastener element from the front surface to the uppermost point O of heads 23 is 0.2 mm. Akeno also specifies an exemplary head length L1 of 0.152 mm, which means that the fastener

overall length is at least 0.304 mm. Akeno, however, does not specify the length of the stem 21, or necks 22, between the two heads, and thus does not permit a calculation of the overall length of the fastener. While the stem length appears to be at least twice the length L1 of each head in Figure 4B, which would yield an overall length to height ratio of greater than 1.8, Akeno does not give any indication that Figure 4B is drawn to scale. “[I]t is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.” *Hockerson-Halbertstadt, Inc. v. Avia Group Int’l*, 222 F.3d 951, 956 (Fed. Cir. 2000). Thus, Akeno’s drawings cannot be relied upon to establish that Akeno satisfies the overall length to height ratio limitation of claims 3, 28, 49, and 63 so as to anticipate the subject matter of these claims. Accordingly, the rejection of claims 3, 28, 49, and 63 as anticipated by Akeno cannot be sustained.

Claims 7, 32, 48, and 78

Appellant argues that Akeno fails to provide sufficient information to calculate a ratio of overall length to height of the lowermost extent of a well of a fastener element (Reply Br. 4). As explained above, Akeno does not specify the length of the stem between the heads and, thus, does not provide sufficient information to calculate the overall length of the fastener element. However, we need not calculate the overall length of Akeno’s fastener element to reach the conclusion that Akeno teaches a ratio of the overall length to height of the lowermost extent of a well of greater than 2.5, as called for in claims 7, 32, and 48. With the bottom of the hollow defined between the inner surfaces 22a of necks 22 disposed preferably slightly under a horizontal plane passing lower ends of bottom surfaces of the

engaging heads 23, as disclosed by Akeno, the hollow bottom (lowermost extent of a well) height is slightly less than the height H2, which is 0.125 mm in the exemplary embodiment, but which can be as small as zero. Thus, even assuming a stem or neck length of zero, the ratio of overall length to height of the lowermost extent of Akeno's well or hollow is greater than 2L (0.304 mm) divided by H2 (0.125 mm), which is 2.4, in the exemplary embodiment, and is greater than 2.5 in embodiments described by Akeno wherein H2 is or approaches 0 mm, i.e., there is no stem. Accordingly, Akeno teaches an overall length to height of the lowermost extent of a well of a fastener element of greater than 2.5, as called for in claims 7, 32, and 48.

For the above reasons, Appellant's argument does not persuade us the Examiner erred in rejecting claims 7, 32, and 48 as anticipated by Akeno. The rejection is sustained.

Appellant does not argue the patentability of claim 78 apart from claim 48, from which claim 78 depends. Therefore, in accordance with 37 C.F.R. § 41.37(c)(1)(vii), claim 78 falls with claim 48. *See In re Young*, 927 F.2d 588, 590 (Fed. Cir. 1991); *In re Wood*, 582 F.2d 638, 642 (CCPA 1978). The rejection of claim 78 is also sustained.

Claims 8, 33, 52, 61, 62, and 79

Appellant argues against the rejection of claims 8, 33, 52, 61, and 62 together as a group. Appellant offers no separate argument against the rejection of claim 79 apart from that of claim 61, from which claim 79 depends. Therefore, in accordance with 37 C.F.R. § 41.37(c)(1)(vii), we select claim 8 as the representative claim to decide the appeal of the rejection of these claims, with claims 33, 52, 61, 62, and 79 standing or

falling with claim 8. Claim 8 recites that each fastener element has a mold release factor (MRF) defined as the difference between a minimum solid length of the stem, measured parallel to the sheet-form base in side view, and a maximum solid length of the fastener element, measured above an elevation corresponding to the minimum solid length, to the minimum solid length of the stem, of less than 0.1. Appellant contends that “the Examiner improperly relies on scaling of unscaled patent drawings and/or improper inferences derived from such drawings” in rejecting these claims. Reply Br. 5. According to Appellant, Akeno fails to provide or define either a minimum solid length of the stem or a maximum solid length of the stem. Appellant thus reasons that Akeno cannot be used to calculate a MRF. *Id.*

Akeno’s Figure 4B quite clearly illustrates a stem of constant length. Scaling of the drawings is not required to convey such information. Therefore, any elevation along the stem can be identified as the elevation of the minimum solid length of the stem. Akeno also teaches that the bottom of the hollow defined between the inner surfaces 22a of necks 22 “should be disposed preferably in or slightly under a horizontal plane passing lower ends of bottom surfaces of the engaging heads 23.” Accordingly, Akeno’s fastener element does not have a solid length above the stem. Consequently, the maximum solid length of the fastener element measured above an elevation corresponding to the minimum solid length of the stem is identical to the minimum solid length of the stem, as both values are equal to the constant length of the stem. Therefore, Akeno teaches a difference between the minimum solid length of the stem and the maximum solid length of the fastener element measured at an elevation above that of the minimum solid length of the stem, and hence a MRF, of zero, which is less than 0.1.

Appellant's argument thus does not demonstrate that the Examiner erred in rejecting claim 8 as anticipated by Akeno. The rejection of claim 8, and claims 33, 52, 61, 62, and 79 standing or falling with claim 8, is sustained.

Claim 11

Claim 11 requires that the lower surfaces of the heads be arched. As clearly illustrated in Figure 4B, the lower surfaces of Akeno's engaging heads 23 are inclined at an angle θ° . They are not arched. The rejection of claim 11 cannot be sustained.

Claims 16, 36, 54, and 67

Appellant argues the patentability of these claims together as a group. Thus, in accordance with 37 C.F.R. § 41.37(c)(1)(vii), we select claim 16 as the representative claim to decide the appeal of the rejection of these claims, with claims 36, 54, and 67 standing or falling with claim 16.

Claim 16 requires that the "crooks" formed by the lower surfaces "overhang" surfaces of the stem. Appellant argues that "Akeno fails to disclose a fastener with crooks, let alone one with crooks overhanging surfaces of the stem." Reply Br. 5.

We first address the argument that Akeno fails to disclose a fastener with crooks. When construing claim terminology in the United States Patent and Trademark Office, claims are to be given their broadest reasonable interpretation consistent with the specification, reading claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364, 70 USPQ2d 1827, 1830 (Fed. Cir. 2004). Appellant does not define the term "crook" or use it in the Specification in any manner inconsistent with or divergent from

its ordinary and customary meaning of “a hooked, bent, or curved thing or part.” We thus construe the term “crook” as used in claim 16 as “a hooked, bent, or curved thing or part.” The lower surface of each of Akeno’s engaging heads defines a surface bent at its junction with the end surface of stem 21 and thus forms a “crook.”

Appellant contends that the Examiner has taken a broader view of the term “overhang” than one of ordinary skill in the art would have in view of Appellant’s Specification. With reference to Figure 3 of the present application, Appellant urges that the term is used in a manner consistent with dictionary definitions such as “to project over something that lies beneath.” Reply Br. 5. While Appellant’s Figure 3 depicts a surface of the stem lying directly beneath, i.e., horizontally aligned with, a portion of the crook of the head, Appellant’s claim is not so limited. The term “overhang” means “to hang or project over or beyond.” We must be careful not to read a particular embodiment appearing in the written description into the claim if the claim language is broader than the embodiment. See *Superguide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004) (“Though understanding the claim language may be aided by the explanations contained in the written description, it is important not to import into a claim limitations that are not a part of the claim. For example, a particular embodiment appearing in the written description may not be read into a claim when the claim language is broader than the embodiment.”) The challenge is to interpret claims in view of the specification without unnecessarily importing limitations from the specification into the claims. See *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1369 (Fed. Cir. 2003). We find nothing in Appellant’s Specification or drawings that

indicates that the term “overhang” as used in claim 16 should be construed any more narrowly than its ordinary and customary dictionary definition. Construction of the term “overhang” in the sense of to hang or project beyond is consistent with Appellant’s depiction in Figure 3 of crooks 256 extending out beyond the planar surfaces of the front and rear faces of stem 108. The lower surfaces or crooks of Akeno’s engaging heads 23 likewise extend out beyond the front and rear surfaces of stem 21, as illustrated in Figure 4B of Akeno.

For the foregoing reasons, Appellant’s argument does not persuade us the Examiner erred in rejecting claim 16 as anticipated by Akeno. The rejection of claim 16, and claims 36, 54, and 67 standing or falling with claim 16, is sustained.

Claims 17, 37, 55, and 68

We do not sustain the rejection of these claims. The front and rear surfaces of Akeno’s stems overhung by the lower surfaces or crooks of engaging heads 23 extend generally normal to the base, i.e., the front surface of sheet 1, not at an angle of between about 20 and 30 degrees with respect to the normal, as required in claims 17, 37, 55, and 68. The angle θ of between 0 and 35° alluded to by the Examiner on page 9 of the Answer is unavailing, because the angle θ is the angle of inclination of the top surface of the heads 23, not the angle of inclination of the front and rear surfaces of stem 21.

Claim 14

Claim 14 requires that the stem have opposing surfaces defined by severed resin. Appellant argues that “[t]hose of ordinary skill in the art will understand the differences between a molded resin surface and a severed

resin surface, and be readily able to distinguish such surfaces in fastener element stems” (Reply Br. 6). Appellant has not provided any evidence either that a person of ordinary skill in the art would understand what is meant by “severed resin” and how it differs from a molded resin surface or that a severed resin surface is readily distinguishable from a molded resin surface by one of ordinary skill in the art. An attorney’s arguments in a brief cannot take the place of evidence. *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). Appellant has not defined the terminology “severed resin,” other than to give “a cut-and-stretch process” as an example of a means for achieving a stem having opposing surfaces defined by severed resin (Specification 4:1-2). The surface achieved by a cut-and-stretch process would ostensibly depend upon such parameters as the state of cure of the resin when cut, the strain rate and temperature at which stretching occurs, and the orientation of the resin with respect to the cut. Therefore, Appellant’s bald argument does not persuade us that the limitation that the stem has opposing surfaces defined by severed resin patentably distinguishes over the molded surface fastener of Akeno, which is formed in part by cutting off the opposite side edges of the molded surface fastener SF with a trimming unit.

As a practical matter, the USPTO is not equipped to manufacture products by the myriad of processes put before it and then obtain prior art products and make physical comparisons therewith. *In re Brown*, 459 F.2d 531, 535 (CCPA 1972). Once the USPTO has made out a *prima facie* case that the applicant’s claimed product and the product of the prior art reasonably appear to be the same, the burden shifts to the applicant to prove otherwise. *Id.* The burden of proof on the USPTO in making out a case of

prima facie obviousness for product-by-process claims is less than when a product is claimed in the more conventional fashion. *In re Fessman*, 489 F.2d 742, 744 (CCPA 1974).

For the above reasons, we find the teachings of Akeno sufficient to establish a prima facie case that Akeno's fastener element and the subject matter of claim 14 reasonably appear to be the same, so as to shift the burden to Appellant to prove otherwise. As noted above, Appellant has not done so. Accordingly, we sustain the rejection of claim 14 as unpatentable over Akeno.

Claim 50

We do not sustain the rejection of claim 50 as unpatentable over Akeno. Claim 50 calls for a ratio of an overall crook height, measured from a lowermost extent of the tip to an uppermost extent of the crook, to an entrance height below a lowermost extent of the corresponding tip, to be greater than 0.6. The lowermost extent of the tip of Akeno's engaging head 23 corresponds to the uppermost extend of the crook (the lower surface of the head). Therefore, the measurement from the lowermost extent of the tip to the uppermost extent of the crook in Akeno's fastener element is zero, thereby yielding a ratio of crook height to entrance height of zero, which is not greater than 0.6. A ratio of other than zero could only be achieved by modifying Akeno to provide a head having a lower surface that extends outwardly and downwardly toward the base. The Examiner has not articulated any reasoning with a rational underpinning as to why it would have been obvious to a person of ordinary skill in the art to so modify Akeno. While an obviousness analysis "need not seek out precise teachings directed to the specific subject matter of the challenged claim," the

Examiner must provide “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1741 (2007).

Claim 64

Claim 64 depends from claim 61, which includes the limitation of an MRF of less than 0.1. Appellant argues that Akeno does not mention a MRF and fails to provide either a minimum solid length of fastener stem or a maximum solid length of fastener stem, and thus cannot be used to calculate a MRF (Reply Br. 7). This argument is not persuasive, for the reasons set forth above in our discussion of the rejection of claims 8, 33, 52, 61, and 62.

Claim 64 further requires a ratio of the overall height of each crook, measured from a lowermost extent of the tip to an uppermost extent of the crook, to an entrance height that is greater than 0.6. As explained above in our discussion of claim 50, the ratio of crook height to entrance height of Akeno’s fastener element is zero, which is not greater than 0.6. Moreover, the Examiner has not articulated any reasoning with a rational underpinning as to why a person of ordinary skill in the art would have been prompted to modify Akeno to achieve a nonzero ratio. Thus, we cannot sustain the rejection of claim 64.

Claims 10 and 35

Claims 10 and 35 require that the tips of the heads extend toward the base. As illustrated in Figure 2, Akeno’s heads 23 are inclined outwardly from the stem 21 in an upwardly inclined direction away from the front surface of the sheet 1 and thus have tips extending away from, and not toward, the base (sheet). The Examiner relies on Takizawa as evidence that it was known in the art at the time of Appellant’s invention to provide

fastener components having tips extending toward the base when such fastener components are used in engaging loops 3 of a mating fastener component. Answer 11. From this the Examiner determines it would have been obvious to provide the fastener components of Akeno with tips extending toward the base. *Id.*

Appellant argues that neither reference discloses a reason to provide a fastener element of Akeno's dimensions with Takizawa's fastener element shape. Appellant further argues that neither reference suggests that even if one were motivated to change the shape of Akeno's elements, the revised shape would continue to have the relevant ratios of dimensions taught by Akeno. Reply Br. 9.

We agree with Appellant. The Examiner has not pointed to any reason that would have prompted a person of ordinary skill in the art to modify Akeno to have a shape as taught by Takizawa. In fact, Akeno appears to be intended as an improvement over the conventional mushroom-type engaging element having an umbrella-shape engaging head projecting in all directions from the upper end of the stem. Accordingly, it is not apparent why a person of ordinary skill in the art would have been prompted to so modify Akeno, while maintaining the dimensional ratios taught by Akeno.

In light of the above, Appellant's argument demonstrates the Examiner falls short in establishing a *prima facie* case of obviousness of the subject matter of claims 10 and 35. The rejection of claims 10 and 35 as unpatentable over Akeno in view of Takizawa cannot be sustained.

CONCLUSION

The decision of the Examiner to reject claims 3, 7, 8, 10, 11, 14, 16, 17, 28, 32, 33, 35-37, 48-50, 52, 54, 55, 61-64, 67, 68, 78, and 79 is affirmed as to claims 7, 8, 14, 16, 32, 33, 36, 48, 52, 54, 61, 62, 67, 78, and 79 and is reversed as to claims 3, 10, 11, 17, 28, 35, 37, 49, 50, 55, 63, 64, and 68.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

vsh

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